IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 12217 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HASMUKH KALIDAS CHOKSHI & 3 - Applicant(s)

Versus

THE STATE OF GUJARAT - Respondent(s)

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Appearance :

MS SAITA S RAJU for Applicant(s) : 1 - 4.
PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 08/08/2005

ORAL JUDGMENT

1. The present Cri. Misc. Application is filed by the petitioners-original accused namely (i) Hashmukh Kalidas Chokshi,(ii)Bhagwandas Kalidas Shah, (iii) Jayantibhai

Kalidas Shah and (iv) Bharat Jayantibhai Shah against the judgment and order dated 02.12.2004 passed below Exh.17 in Sessions case No. 78/2001 by the ld. Addl. Sessions Judge, Ahmedabad City whereby ld. Addl. Sessions Judge dismissed the said application preferred under section 227 of CrPC praying discharge and also praying to quash the chargesheet filed in CR No.44/2001 registered with Maninagar Police Station Ahmedabad.

2. It is the say of the petitioners that initiation of the proceedings for the offences punishable under sections 304,308, 418, 420, 427, 34, 120(B)(1) of Indian Penal code, and sections 3(2)(c)(d), 7(1)(i)(ii)(2) read with section 42 of Gujarat Ownership of Flat act, 1973, is bad and the petitioners could not have been prosecuted for any of the above-said offences and he has been wrongly chargesheeted by the Investigating Agency in connection with the offence being CR No.44/2001 filed by one Shri Arvind Shuklal Jagannath.

3(i) The brief facts of the prosecution against the present petitioners are that during massive earthquake that struck the State of Gujarat on 26.01.2001, a building known as Vishwadarshan Apartment situated in Maninagar area of Ahmedabad city was seriously damaged and major portion of the said building collapsed i.e. one of two blocks was collapsed. It is the say of the

prosecution on the strength of the allegations made in the complaint as well as in the papers of investigation, that the petitioners are the responsible person for the collapse of the building as the super-structure had collapsed because of irresponsible pattern of construction and certain omissions and commissions in constructing the building which ultimately collapsed resulting into the loss of lives and properties of the individuals who were occupying the flats in the said apartment.

(ii) As per the say of the prosecution witnesses, Vishwadarshan Apartment was lacking in quality of construction and 08 people expired and about 13 persons sustained injuries. Though building was used after obtaining “Building Use Permission” popularly known as “BU Permission”, occupants of the flats had complained about the poor quality of construction much prior to its collapse and also regarding irregularities in constructing the building.

4. According to ld. Counsel Mr. SV Raju appearing for ld. Counsel Ms. Saita Raju for the petitioners, the provisions of contained in sections 418 & 420 of IPC do not even remotely emerge from the complaint or for that matter, from the entire records pertaining to the investigation. In absence of evidence as to cheating, the

petitioners could not have been prosecuted for the offence punishable under sections 418 & 420 of IPC. He has placed reliance on the decision of **Hari Prasad Chamaria v/s Bishun Kumar Surekha & Ors., (1973)2 SCC 823** and submitted that in view of the ratio propounded by the Apex Court in the aforesaid decision, the petitioners accused could not have been prosecuted for the aforesaid offence. It is argued by ld. Counsel appearing for the petitioners that the accused has been asked to face a trial of very serious offence of “culpable homicide not not amounting to murder” under section 304 of IPC initially. When the accused had approached this Court, the Court quashed the said offence on some concession made on behalf of the State and it was submitted that the provisions of Section 304 Part:II of IPC may be attracted in view of the nature of allegations made by the complainant and evidence placed by the prosecution witnesses. The chargesheet indicates commission of an offence under section 304 IPC simpliciter. Ld. Counsel appearing for the petitioners has attempted to take this Court through certain decisions and one book wherein the effect of the real earthquake has been described in detail in a scientific method. Zerox copy of the print out taken from the World Book Encyclopedia referred to by ld. Counsel is also tendered before the Court for

perusal. Undisputedly, the building collapsed because of the stroke of the earthquake which was on the pillers erected for construction of various apartments in a multi-storyed building and the collapse can not be attributed to to anybody i.e. building contractor, designer or supervisor.

5. I have considered technical as well as legal arguments advanced by ld. Counsel Mr. Raju appearing for the petitioners and it is amply clear that it would be difficult for this Court to accept that any of the accused can be, prima facie, even held responsible for the offence or should be tried for the offence of committing homicidal death not amounting to murder.

(i) Culpable homicide is the causing of the death of a person in three ways : 1. With the intention of causing death, 2. With the intention of causing such bodily injury as is likely to cause death, and 3. With the knowledge that the offence is likely by such act to cause death. The offence of culpable homicide becomes murder when four circumstances exist. They are mentioned in S.300. A number of exceptions are however included, and those exceptions show extenuating circumstances on strict proof of which the offence is again brought down to

culpable homicide not amounting to murder. The causing of the death of a person by doing an act accompanied by intention in the two ways described in S.299 or with the knowledge that the act is likely to cause death also described there is thus distinguished from cases of deaths resulting from accident or rash and negligent act and those cases where death may result but the offence is of causing hurt either simple or grievous. Once it was established, as was established in this case, that the act was a deliberate act and was not the result of accident or rashness or negligence, it is obvious that the offence which was committed was one under S. 304. In the present case however death was not the result of the act of a single individual but was the result of the act of several persons, and they shared the common intention, namely the commission of the act or acts by which death was occasioned. **[Afrahim Sheikh and others Vs. State of West Bengal, AIR 1964 SC 1263]**

(ii) In view of Section 300 of the Penal Code, except in cases covered by the five exceptions mentioned therein, culpable homicide is murder. It is well known that if a death is caused and the case is covered by any one of the five exceptions of Section 300 then such culpable homicide shall not amount to murder. S. 304 provides punishment for culpable homicide not amounting to murder

and draws a distinction in the penalty to be inflicted in cases covered by one of the five exceptions, where an intention to kill is present and where there is only knowledge that death will be a likely result, but intention to cause death or such bodily injury which is likely to cause death is absent. To put it otherwise if the act of the accused falls within any of the clauses (1), (2) and (3) of Section 300 but is covered by any of the five exceptions it will be punishable under the first part of Section 304. If, however, the act comes under clause (4) of Section 300 i.e. the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death but without any intention to cause death and is covered by any of the exceptions, it will be punishable under the second part. The first part of Section 304 applies where there is guilty intention whereas the second part applies where there is guilty knowledge. But before an accused is held guilty and punished under first part or second part of Section 304, a death must have been caused by him under any of the circumstances mentioned in the five exceptions to Sec. 300,which includes death caused while deprived of power of self-control under grave and sudden provocation, while exercising in good faith the right of private defence of person or property, and in a sudden fight in

the heat of passion without premeditation. [**Harendra Nath Mandal Vs. State of Bihar, AIR 1993 S.C. 1977].**

6. On careful reading of the impugned order, it emerges that the details arguments were advanced before the ld. Trial Judge i.e. ld. Addl. Sessions Judge dealing with the trial, but the ld. Judge recorded finding on certain assumption and conjunctures for the purpose and observed that the petitioners were the persons responsible for deliberately constructing and putting up super-structure in such a fashion with a deliberate intent on the part of the petitioners which can be said to be not worthy to resist earthquake stroke. I would like to refer to relevant para of the impugned judgment and order whereby it is inferred that the arguments of ld. Counsel Mr. Raju were not capable of appealling to the conscious of the trial Court. It is observed that investigation reveals that there were number of irregularities in construction of the scheme of the apartment and they are built to indicate that the construction poor in quality and there were material available on record which indicates that residents of the flats lost their lives but for the poor quality of the construction. Placing reliance on the ratio of the decision of **Om Wati (Smt.) & Anr. V/s State through**

Delhi Administration & Ors., (2001)4 SCC 333, it is observed that no reasons are required to be recorded that charges are framed against the accused if prima facie case is made out against the accused, the Judge must proceed to frame charge in terms of section 228 of CrPC. According to the ld. Addl. Sessions Judge, he was satisfied about the strength of the prima facie case against the petitioners as would necessitate proceeding with the trial against the accused and further necessitates framing of charge under section 228 of CrPC. In view of the observations made by the ld. Addl. Sessions Judge referred to above, the following facts which are clearly emerging from papers of investigation placed on record:-

1. Actual strength of the building was not under doubt even by local administration who accorded BU Permission;

2. Sample of material used even for the sake of argument it is accepted that the same was found of sub-standard, that itself would not give rise to a legal inference that the accused could have gathered knowledge that in the stroke like earthquake, the building would collapse.

3. The element of intention is totally missing.

4. Greed to increase margin of profit would not make the petitioners responsible for the offence punishable for committing homicidal death not amounting to murder or making such alteration in the design of the structure approved by the local-self government like Ahmedabad Municipal Corporation would also make him liable for the said offence because local-self governments themselves after accepting some type of fees, penalties or fine, are regularising certain irregularities which are not found of eminent danger to the users of the building or persons residing in the building.

7(i) In response to the query raised by the Court, Ld. Counsel appearing for petitioners accused has strongly resisted the proposition of law and stated that at least the irregularity found during the course of investigation can be equated with an act of negligence and prima facie it should be inferred that all the accused was having any knowledge or intention that building will collapse in the natural disaster like earthquake or even on account of the act of man-made destruction like blast etc. There is a scope of appreciation of evidence and arguments that have been

advanced before this Court which are were also advanced before the trial Court about the non-collapse of the buildings in just neighbouring area of the apartment which has collapsed. It is very likely that the Court will have to examine first about the trimours of the stroke of earthquake and movement of the earth beneath the circumference. How a human habitant can be constructed in a negligent manner or by using sub-standard material or by making gainful changes in violation of Rules or Plans approved by the local-self government in consonance of the Rules, is the question that has to be addressed by the trial Judge. The Court is not impressed with the say of ld. Counsel Mr. Raju that even the charge for the offence under section 304-A could not be framed against the petitioners. However, indirectly, the Court has gathered from the submissions of Mr. Raju that the grievance of the petitioners is that he is being asked to face trial of culpable homicide not amounting to murder means the person who has knowingly caused the death of the persons or have sustained injuries in the collapse of the apartment.

(ii) It is submitted by ld. Counsel Mr. Raju that the apartments are being normally erected in the manner that simultaneously registration of the potential occupants is

also made and the amount received from such occupants is also being used in completing the super-structure of the residential premises. A persons who approach a builder or a contractor or a developer, are mainly either known to them and some occupants are event distant relatives. The details of that to be recorded would unearth whether any such contingency was present in the case on hand. But these arguments would positively help the petitioners in getting himself discharged from a serious charge for the offence punishable under section 304 Part-II of IPC because the person who is having knowledge about the strength of the building and nature of construction erected/ constructed by him, would not sell or hand over any such premises or apartment either to his relatives or friends or persons who have approached them. The question posed before the Court by the ld. Counsel may be found relevant whether that very building could have collapsed after lapse of some period or after several years, but for the severe earthquake? While developing this arguments, ratio of the decision in the case of **Kurban Hussein Mohamedali Rangawalla v/s State of Maharashtra, AIR 1965 SC 1616** is placed before the Court. In the cited decision, the Apex Court, while dealing with the offence punishable under section 304-A of IPC, has

observed that the death must be a director or proximate result of rash and negligent act of the accused and act must be efficient cause without intervention of other's negligence and it must be causa causans, it is not enough that it may have been the cause sine qua non. It is observed therein that the Court while framing charge or dealing with an application preferred under section 227 of CrPC, can do some exercise to evaluate the material and documents available on record.

Certain observations made by the Apex Court in the case of **Keshub Mahindra v/s State of M.P., (1996)6 SCC 129 (popularly known as Bhopal Gas Tragedy Case),** are also relied upon by ld. Counsel Mr. Raju for the petitioners. I would like to reproduce some observations made by the Apex Court in paras 19 & 20 of the said decision:-

> "19. The learned Senior Counsel for the appellant-accused on the other had submitted that even if taking the material available on record at the stage on its face value the short question is whether any charge could have been framed against the accused under Section 304 Part-II IPC with our without the aid of Section 35 IPC and even for that matter any

charges could have been framed under Sections 326, 324 or 429 with or without the aid of Section 35 IPC. We may at once state that both the learned Sessions Judge as well as the High Court have taken the view on the aforesaid material that a prima facie case has been made out by the prosecution requiring the accused to face the aforesaid charges and the trial of the accused on these charges can not be cut short or nipped in the bud in the light of the aforesaid material which has to be accepted as prima facie true and reliable at this preliminary stage of framing o charges.

20. It, therefore, becomes necessary for us now to address ourselves on this moot question. As noted earlier the main charge framed against all the accused is under section 304 Part II IPC. So far as Accused 2,3, 4 and 12 are concerned, they are also charged with offences under sections 326, 324 IPC and 429 IPC read with Section 35 IPC while Accused 5 to 9 are charged substantially with these offences also. We shall fist deal with the charges framed against the accused concerned under the main provisions of Section 304 Part II IPC. A look at

Section 304 Part II shows that the accused concerned can be charged under that provision for an offence of culpable homicide not amounting to murder and when being so charged if it is alleged that the act of the accused concerned is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as likely to cause death the charged offences would fall under Section 304 Part II. However, before any charge under Section 304 Part II can be framed, the material on record must at least prima facie show that the accused is guilty of culpable homicide and the act allegedly committed by him must amount to culpable homicide. However, if the material relied upon for framing such a charge against the accused concerned falls short of even prima facie indicating that the accused appeared to be guilty of an offence of culpable homicide Section 304 Part I or Part in the interest of justice would get out of the picture. In this connection we have to keep in view Section 299 of the Indian Penal Code which defines culpable homicide. It lays downs that :-

> “Whoever cause death by doing an act with the intention of causing death, or with the

> intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Consequently, the material relied upon by the prosecution for framing a charge under Section 304 Part II must at least prima facie indicate that the accused had done an act which had caused death with at least such a knowledge that he was by such act likely to cause death. The entire material which the prosecution relied upon before the trial court for framing the charge and to which we have made a detailed reference earlier, in our view, cannot support such a charge unless it indicates prima facie that on that fateful night when the Plant was run at Bhopal it was run by the accused concerned with the knowledge that such running of the plant was likely to cause deaths of human beings. It cannot be disputed that ere act of running a Plant as per the permission granted by the authorities would not be a criminal act. Even assuming that it was a defective Plant and it was dealing with a very toxic and hazardous substance like MIC the mere act of storing such a material by th accused in Tank NO. 610 could not even prima facie suggest that the

accused concerned thereby had knowledge that they were likely to cause death of human beings. In fairness to the prosecution it was not suggested and could not be suggested that the accused had an intention to kill any human being while operating the Plant. Similarly on the aforesaid material placed on record it could not be even prima facie suggested that the accused had an intention to kill any human being while operating the Plant. Similarly on the aforesaid material placed on record it could not be even prima facie suggested by the prosecution that any of the accused had a knowledge that by operating the plant on that fateful night whereat such dangerous and highly volatile substance like MIC was stored they had the knowledge that by this very act itself they were likely to cause death of any human being. Consequently, in our view taking the entire material as aforesaid on its face value and assuming it to represent the correct factual position in connection with the operation of the Plant at Bhopal on that fateful night it could not be said that the said material even prima facie called for framing of a charge against the accused concerned under Section 304 Part II IPC on the

specious plea that the said act of the accused amounted to culpable homicide only because the operation of the Plant on that night ultimately resulted in deaths of a number of human beings and cattle. It is also pertinent to note that when the complaint was originally filed suo motu by the police authorities at Bhopal and the criminal case was registered at the Police Station Hanumanganj, Bhopal as Case No. 1104 of 1984 it was registered under Section 304-A of the IPC. We will come to that provision a little later. Suffice it to say at this stage that on the entire material produced by the prosecution in support of the charge it could not be said even prima facie that it made the accused liable to face the charge under Section 304 Part-II. In this connection we may refer to a decision of the Calcutta High Court to which our attention was drawn by the learned Senior Counsel, Shri Rajendra Singh for the appellants. In the case of Adam Ali Taluqdar v. King-Emperor a Division Bench of the Calcutta High Court made the following pertinent observations which interpreting Section 304 Part-II read with Section 34 IPC :

> “Although to constitute an offence under Section 304, Part 2, there must be no intention of

> causing death or such injury as the offender knew as likely to cause death, there must still be a common intention to do an action with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act, they are jointly doing, is one that is likely to cause death but have no intention to causing death, yet they may certainly have the common intention to do that act and therefore Section 34 can apply to a case under Section 304, Part 2."

> Once we reach the conclusion that the material produced by the prosecution before the trial court at the stage of framing of charges did not even prima facie connect the accused with any act done with the knowledge that by that act itself deaths of human beings would be caused the accused could not be even charged for culpable homicide and consequently there would be no question of attracting Section 304 Part-II against the accused concerned on such material."

Method of evaluation of quality of the material individually and jointly used is also likely to be brought under close scrutiny and has to be decided by experts and in such a situation how a person can be prosecuted for a serious offence punishable under section 304 of IPC, is the question posed. While appreciating this submission, observations made in the

case of **Niranjan Singh Karam Singh Punjabi v/s Jitendra Bhimraj Bijja and others, AIR 1990 SC 1962,** needs consideration. It is observed therein that the Court while framing charge or dealing with an application preferred under section 227 of CrPC, can do some exercise to evaluate the material and documents available on record.The Apex Court, in the cited decision, after referring to the observations made in one earlier decision (AIR 1980 SC 52), has observed that:-

> From the above discussion, it seems well settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

It has been rightly argued by ld. Counsel appearing for the petitioners/s that sample which was drawn was of

a small portion of one column out of large number of columns. Similarly, the sample of beam which was drawn was of a small portion of one beam out of large number of beams. Even if the opinion of the expert is that these samples are of sub-standard, that can not lead to an inference that entire beam or all beams as well as entire column or all columns were of sub-standard. He has also rightly submitted that there is no evidence on record as to the cause of collapse of building.

One more argument is advanced by ld. Counsel Mr. Raju can not be ignored by this Court viz. when the accused have been asked to face charge of a serious offence, before earthquake of 26.01.2001, the Ahmedabad Municipal Corporation had different standards in approving plans of construction and AMC being a local self government, has now changed the standards. But the day on which the apartment in question was erected, the construction was made as per the norms applied by the MC and, therefore only, the occupiers were permitted to use the building. Suppose for the sake of arguments it is accepted that construction was not as per the contract between the apartment holders and the developer/ contractor and breach of contract made by the developer

was noticed by anybody including the occupiers who lost their lives, but that by itself can not be equated with the knowledge or intention within the meaning of section 299 of IPC.

8. According to ld. PP Mr. Oza, the petitioners are responsible for the collapse of the building and it can reasonably be inferred that but for poor quality of construction and variations made in design, the building has collapsed and the petitioners and persons working with him were able to know that such a super-structure can not exist and resist any stroke either man-made or natural like earthquake. So, there is an element of knowledge and, therefore, when bail application was argued, the proposition made by ld. Advocate General that the case would fall in the category of the offence punishable under Sec.304 Part:II of IPC was found acceptable to the accused persons. Ld. PP Mr. Oza has drawn attention of the Court to various irregularities found and the quality of the material used. He has taken this Court through the panchanama drawn by the investigating agency and opinion of the experts that has been considered by the ld. Addl. Sessions Judge before framing of the charge which could not be noticed by the

innocent occupiers of the apartment and, therefore, they have lost their lives. Stroke of earthquake was not grave in the area where apartment in question has collapsed otherwise all other buildings in the area could have sustained great damage. So, the buildings that were poorly constructed in violation of the norms of construction, occupants of those building have lost their lives or have sustained bodily injury. Therefore only, the offence of culpable homicide not amounting to murder is registered. It is not the case of the prosecution that deaths have been caused, but it was possible to infer that the building in the event of any stroke like the earthquake when collapses, it can be said that for buttressing the profit more, such building was erected in a reckless manner and which has ultimately resulted into great loss.

9. Having considered the totality emerging from record and in view of the discussion made above, the Court is of

the view that, prima facie, the accused persons could have been chargesheeted for the offence punishable under section 304 Part:II of the IPC along with other sections which the accused is charged, as there is no element of knowledge or intention on the part of the petitioners. As

there is also no element of any criminal conspiracy, the petitioners could not have been chargesheeted for the offence punishable under section 120-B of IPC. This section has a direct nexus with an intention and mitigation of mind. When a major change is found to be related to the element of negligence, may be by overt act or by omission, there can not be even assumption of conspiracy. Lack of reasons, to earn some more profit or to get illegal gratification may result in to negligence and also criminal negligence. The same is an independent offence punishable under IPC. The court is prima facie satisfied that the element of intention to commit a criminal wrong is lacking and, therefore, the accused could not have been chargesheeted for the said offence. So, the petitioners at least should have been discharged from the offence punishable under section 304 & 120-B of the IPC and ld. Addl. Sessions Judge ought to have said that the accused should be asked to face charge of the offence punishable under Section 304-A of IPC along with other offences charges referred to above.

10. For the reasons aforesaid, the Cri. Misc. Application is partly allowed. The petitioners accused are discharged from the charge of the offence punishable under section 304 & 120-B of IPC and charge framed

against the petitioners accused for the aforesaid offences is hereby quashed and set aside. As discussed in para-9 above, the accused shall be prosecuted for the offence punishable under section 304-A of Indian Penal Code and, therefore, the charge in the background of the totality and other charges shall have to be framed accordingly. It is further observed and directed that after framing of the charge accordingly, if rest of the offences charged against the petitioners accused are triable by the lower Court, then ld. Addl. Sessions Judge shall see that trial is sent to the Lower Court i.e. the Court of ld. Metropolitan Magistrate, Ahmedabad City for its disposal in accordance with law, in view of the scheme of the provisions under CrPC.

Rule is made absolute in above terms.

(C.K. BUCH, J)

*rawal